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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 92-643

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CITY OF HENDERSON, A NEVADA MUNICIPAL CORPORATION, JAMES GOFF, CHIEF OF POLICE OF THE CITY OF HENDERSON,

PETITIONERS

v.

UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA,

RESPONDENT

NEVADA ENTERTAINMENT INDUSTRIES, INC., A NEVADA CORPORATION AND DANIEL BISHOP,

REAL PARTIES IN INTEREST

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

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Pursuant to Rule 15.7 of the Rules of the United States Supreme Court, Petitioners City of Henderson, a Nevada Municipal Corporation, and James Goff, Chief of Police of the City of Henderson, Nevada (hereinafter collectively

referred to as "Petitioner"), file this Supplemental Brief for the purpose of calling this Court's attention to the Decision and Final Judgment of the United States District Court, District of Nevada, in the trial court below which Petitioner received in the United States Mail on Monday, November 30, 1992). A copy of said Decision and Judgement is attached hereto as Appendix "A" to this Supplemental Brief. Petitioner contends that the entry of this Decision and Final Judgment by United States District Court Judge Lloyd D. George on November 27, 1992 constitutes a direct violation of the Eleventh Amendment to the Federal Constitution, which requires immediate review by this Court.

Petitioner was informed by Deputy Clerk Basil on Tuesday, December 1, 1992, that the City's Petition for Writ of Certiorari herein in No. 92-643 (hereinafter "Petition") will be before

the United States Supreme Court for a decision at its conference on Friday, December 4, 1992.

Petitioner contends that the United States District Court's Findings of Fact and (Erroneous) Conclusions of Law in its November 27, 1992 Decision (see Appendix A) unequivocally establish Petitioner's right to immediate relief and dismissal of the federal complaint on the authority of Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) and Watson v. Buck, 313 U.S. 387 (1941), pursuant to a peremptory writ of mandamus under the All Writs Act, as requested in the Petition for Writ of Certiorari (see Petition in No. 92-643 at pages 3-4 and Conclusion at page 62), or pursuant to the grant of its Petition for Writ of Certiorari and oral argument on Questions I and IV of said Petition (see Petition in No. 92-643 at pages i and iii).

STATEMENT OF FACTS

(A) FACTS TAKEN FROM THE RECORD.

The City of Henderson, Nevada, adopted a new, comprehensive Municipal Zoning Code and Municipal License Code in 1989, following lengthy public hearings and proceedings on such Codes. Under the Zoning Code, as amended, a new provision was added for an "adult business" which was authorized only in the "CH Zone." Prior to opening for business, all prospective businesses were required to submit an application for, and obtain, a revenue-based business license, truthfully disclosing the precise nature of the intended business operation. [A business license will not issue unless the intended business operation is located in a proper zone.] An "adult business" was among several enumerated business uses which required application for a conditional use permit.

Federal plaintiffs Nevada Entertainment Industries, Inc. et al., are operators of an Adult Business, who wished to locate in the city of Henderson, Nevada. Upon locating a prospective site available for rent, they entered into a lease. Several months after federal plaintiffs had signed their lease, they applied to the City for a business license.

(B) FINDINGS OF FACT TAKEN FROM UNITED STATES DISTRICT COURT JUDGE GEORGE'S DECISION.

At pages 7 and 8 of its Decision, United States District Court Judge George made the following findings of fact (see Appendix A at pages 7 and 8):

> "In the present case, plaintiffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the

plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge the law by opening and operating an adult business without obtaining any license.

"Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected,

submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As permitted by H.M.C. Section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

(C) CONTINUATION OF FACTS TAKEN FROM THE RECORD.

At the state license revocation proceedings, the City Council determined that federal plaintiffs'

misrepresentations were material, deliberate, and were intended to mislead the city, and violated state law.

In this state quasi-judicial administrative proceeding, federal plaintiffs freely and without reservation, voluntarily asserted and litigated as a defense, among others, the same federal constitutional issues which were presented in the federal civil rights action.

The administrative enforcement hearing resulted in the City Council's written order dated April 16, 1990, which (1) immediately revoked the business license and (2) stayed action to enforce the revocation for ten days, in order to allow the licensees the opportunity to immediately seek judicial review of the City action before the City Council, as provided by Henderson Municipal Code, H.M.C. Section 4.06.160. See also the concluding request of

licensees' attorney, Mr. Diamond at the hearing on the license revocation:

> "....if you do vote for revocation, which I earnestly ask you not do, we would ask that the Council stay its order revoking the license, which this Council is empowered to do under the provisions of the ordinance, to give us a chance to file a lawsuit against the City of Henderson and the individual Councilmembers under the Federal Civil Rights Act which is applicable either in the State court or the Federal court, to give us a chance to sue the Council, its individual members and the City for monetary damages for deprivation of my clients federally protected civil rights. If the Council has any questions or comments, I'd be glad to try to

answer them. Thank you very much."

(Our emphasis.)

Instead of appealing the City Council's administrative factfinding and license revocation in state court as authorized by the City Council, licensees filed this action in federal court as a defense to the City's enforcement action during the period in which the issue was still pending because of the stay and the ten day statutory period allowed by the City Council to appeal the City's action within the state judicial system, thereby invoking the abstention doctrine formulated in Younger v. Harris, 401 U.S. 37 (1971), Huffman v. Pursue, Ltd., 420 U.S. 592 (1975), and their progeny.

On April 27, 1990, the United States District Court granted a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. On June 4, 1990, following

oral argument on Plaintiffs' Motion for a preliminary injunction and without taking additional testimony or evidence, the United States District Court preliminarily enjoined the Defendants from further action on the matter in general, but left the City Council's revocation of the business license undisturbed.

After further study of the United States Supreme Court's opinion in Huffman v. Pursue, Ltd., supra, the City of Henderson declared their refusal to consent to federal jurisdiction [see Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471 (1977)], and filed: (1) a declaratory judgment lawsuit in the Nevada District Court. (City of Henderson v. Nevada Entertainment Industries, Inc., Clark County District Court No. A 288647, filed October 1, 1990); and (2) a motion to dismiss the Civil Rights

lawsuit in the United States District Court on the grounds of lack of federal jurisdiction (11th amendment) and failure to state a claim upon which relief can be based (Huffman v. Pursue, Ltd.), and requested the United States District Court to issue an order to show cause why Plaintiffs should not be required to present their federal constitutional claims in the State lawsuit; that such motions be set for an immediate hearing on the grounds that the Huffman doctrine applied to this case, and that the District Court had no discretion in the matter and was required to dismiss the federal complaint.

ARGUMENT

THE FINDINGS OF FACT AND ERRONEOUS CONCLUSIONS OF LAW IN THE FEDERAL TRIAL COURT'S DECISION OF NOVEMBER 27, 1992 ARE SO EGREGIOUS AS TO MANDATE IMMEDIATE RELIEF UNDER HUFFMAN V. PURSUE, LTD. AND WATSON V. BUCK AS TO THE PETITION FOR WRIT OF CERTIORARI IN NO. 92-643.

(A) RELIEF PURSUANT TO THE ALL WRITS ACT.

Petitioner requests this Court to take Judicial Notice of the Findings of Fact and Erroneous Conclusions of Law in the federal trial Court's November 27, 1992 Decision in so far as those Findings impact Petitioner's pending request for immediate relief under Case No. 92-643 as to the 11th Amendment violation. These additional factors militate against all philosophical arguments that the claims in 92-643 will only support a claim for discretionary relief, but will not support a claim for mandatory relief. Because this Supplemental Brief in No. 92-643 presents this Court with the same issues which will be presented to this Court on an appeal from the trial Court's judgment, and because the right to immediate extraordinary relief under Huffman and Watson is so clear, this

Court should resolve the matter now in No. 92-643, once and for all, and should not require Petitioner to start all over and run the gauntlet with an Appeal from the November 27, 1992 judgment.

(B) IRREPARABLE HARM TO THE CITY.

The United States District Court's Findings of Fact and Erroneous Conclusions of Law in its November 27, 1992 Decision constituted an egregious violation of this Court's often stated policy against federal interference in important state matters (i.e. control over the prevention of obtaining a business license by fraudulent means) which are in train in the state's (quasi) judicial system, and evidence a clear disregard of this Court's long line of precedential authorities on "comity" and "jurisdiction" in abstention cases.

The harm that Petitioner envisioned

would occur [namely, an interpretation of state law and city ordinances that is erroneous and authoritative but non-definitive, which would require additional duplicative and unnecessary litigation in both the state and federal court], has occurred. Not only are the United States District Court's ruling [regarding the scope and interpretation of Nevada procedural law] contrary to what Petitioner contends the state trial court's rulings will be in the state court system, attorneys for the Real Parties in Interest have now given notice that they will hereafter proceed with further litigation in both the state system and on an appeal in the federal system.

One of the more egregious rulings of the United States District Court is its ruling that even though federal plaintiffs failed to established that a federal civil rights violation had

occurred; that it will not award attorneys fees to the City under the test established by this Court as to an award of attorney fees for prevailing defendants in the dismissal of a 42 U.S.C. Section 1983 federal civil rights action, notwithstanding the Court found as the basis for its dismissal (as the City Council had found in the first instance) that the Real Parties in Interest had fraudulently obtained the City license.

(C) THE NOVEMBER 27TH JUDGMENT DOES NOT MOOT THE PETITION FOR WRIT OF CERTIORARI IN CASE NO. 92-643.

If this Court does not grant immediate relief under Case No. 92-643, Petitioner will have to start all over again and appeal the November 27th Judgment on the failure to award attorney fees and on the grounds that the Court's rationale is patently erroneous and is not a correct, definitive statement as to the interpretation which a

state trial Court would give to the Henderson City Ordinances and the state procedural law which governs the appellate process in cases where licenses are revoked under the Henderson ordinance.

(D) CONTENTIONS OF THE CITY OF HENDERSON THAT THE FEDERAL DISTRICT COURT HAS EGREGIOUSLY INTERFERED WITH IMPORTANT STATE INTERESTS AND THE STATE JUDICIAL PROCESS, AND HAS RENDERED A DECISION WHICH IS ERRONEOUS AND AUTHORITATIVE BUT NOT DEFINITIVE, AND WHICH IS AT ODDS WITH NEVADA STATE LAW UNDER AN "AUTHORITATIVE" INTERPRETATION BY THE STATE COURT WHICH MUST NOW BE SOUGHT BY THE CITY.

Following lengthy public hearings and proceedings, the City of Henderson enacted a new comprehensive municipal zoning and license Code, the provisions of which have never been reviewed by the State of Nevada judicial system. Petitioner City of Henderson contends that if such provisions are litigated in the State Court system by a State Court which (unlike the federal Court) is authorized to reach an authoritative

interpretation, the City Ordinances will be given the following differing interpretations than those given by the United States District Court, for the following reasons:

1. Only a state court can give a state statute or city ordinance an authoritative and definitive interpretation.

2. A federal Court must defer to a state court which has been requested to give a newly enacted ordinance its first authoritative interpretation. Watson v. Buck, 313 U.S. 387 (1941).

3. The City Council, acting as a quasi-judicial body, has the power to conduct hearings and revoke business licenses which have been procured through fraud. H.M.C. Sections 4.06.010 - 44.06.160.

4. Under the City Charter and state law, the City Council has the power to enact City Ordinances setting

forth quasi-judicial procedures which are to be followed in conducting hearings which are brought before it relating to the revocation of a business license which City administrative officials claim has been procured through a fraudulent application of the license.

5. Under federal law, a state has the power to determine at what stage in the proceedings a a licensee may make a constitutional challenge to a City ordinance or state statute, so long as the licensee is given a fair and reasonable opportunity to claim his federal constitutional rights. State law may permit such litigation of federal constitutional issues in state court proceedings and forms not permissible in the federal courts. Adler v. Bd. of Education, 342 U.S. 485, 96 L.Ed. 517, 529, 72 S.Ct. 380, 27 A.L.R.2d 472 (1952) (dissenting opinion); see Antieau, Modern Constitu-

tional Law, Vol. 2, pp. 635-638 at Section 15.14, "Rules Governing the Litigation of Constitutional Questions in State Court."

6. The City Council has the power under Nevada law to enact a procedure in which it determines that it should conduct license revocation hearings under a general presumption that the state statutes and city ordinances are constitutional and that such federal constitutional challenges shall be heard by the Nevada District Court, and not by the City Council, so long as it affords the licensee an opportunity to contest the federal constitutionality of such laws in the Nevada District Court and suspends enforcement of its Order until after such Constitutional challenge has been made and ruled upon by the Nevada District Court.

7. Henderson Municipal Code, H.M.C. Section 4.06.160 provides as

follows as to the scope of review by the state District Court:

> "4.06.160 Judicial Review. Any person aggrieved by final decision or order of the City Council made after hearing or rehearing as heretofore provided, and whether or not a petition for rehearing was filed, may obtain a judicial review of questions of law thereof in the Eighth Judicial District Court." (Our Emphasis.)

The above words and phrases reading "judicial review of questions of law thereto in the Eighth Judicial District Court" were intended by the City Council to codify the scope of review which the Nevada Courts presently apply to questions of law (which includes mixed questions of law and fact. In some cases, the scope of review in Nevada Courts is limited to issues which are presented in the administra-

tive record before the City at the time of its decision; in other cases the scope of review is broader and approaches a review de novo. See Alberty v. City of Henderson, 106 Nev. 299 (1990), at 302-304. In either event [including the narrower review limited to those issues appearing in the administrative record], where a federal constitutional challenge is presented by the licensee at the City Council hearing, the challenge is a "matter of record", and the resolution of such a legal challenge, as applied to the specific facts of the case would, under H.M.C. Section 4.06.160, be a "question of law" subject to judicial review by the Eighth Judicial District Court. Further, the rule of law as to the meaning of such language differs from State to State and there is no controlling general law. Compare the United States District Court's

ruling in this regard in its Decision at page 4, line 4 through page 6, line 5 (Appendix A).

The United States District Court's conclusion in its Decision at page 4, lines 18-19, that abstention is not compelled, reading:

> "Conversely, a proceeding which does not permit judicial review of constitutional claims is insufficient to compel abstention."

is erroneous because the underlying conclusion that the constitutional claims are not subject to review under the Henderson Municipal Code is itself erroneous.

8. There is a marked difference in the way in which the state and federal courts approach a resolution of the constitutional issue regarding legislation. The state courts are obliged to render a construction of state legislation which will arrive at

a constitutional result. See Petition at page 53-57. On the other hand, a federal trial court, with a "subconscious" interest in resolving constitutional disputes (and which denies that comity demands abstention) will have an inclination to deny the applicability of Huffman v. Pursue, Ltd., with the jurisdictional requirement for "heightened pleadings" set by this Court (see Petition at Question IV on page iii and "Conclusion" at pages 63-64) by giving to the words and phrases described in the above paragraph 7 an awkward, narrow, and constrained construction which will defeat the Huffman requirement. See also the United States District Court's comment on its view of abstention at Appendix A, at the first full paragraph on page 3.

9. Petitioner concedes that rightfully or wrongfully, the United States District Court had "jurisdiction to

determine the question of jurisdiction" [see U.S. v. United Mine Workers of America, 330 U.S. 258 (1974), and Petition at page 52] up to and including November 27, 1992, in as much as it had not, until that date, responded to Petitioner's Huffman challenge to jurisdiction (see Petition at page 19, fn. 5), and the appellate courts had not taken any action to require it to decide the Huffman "heightened pleading" requirement.

10. Petitioner contends that one of the issues which is properly raised by the Younger-Huffman abstention issue is whether the federal court lacks "subject matter jurisdiction" to decide the merits of federal plaintiffs' claims. It is clear beyond doubt that the foundation for the Younger-Huffman challenge is the Eleventh Amendment to the Federal Constitution. If a federal Court were to find that an Eleventh

Amendment violation had occurred, it would have to conclude as a matter of law that the jurisdiction of the subject matter was in the state court and, at that stage of the proceedings and for that reason, the federal court would lack "subject matter jurisdiction." See also and compare the "in rem" exception discussed in Mitchum v. Foster, 407 U.S. 225, 32 L.Ed.2d 705 at page 713-714 re Toucey v. New York Life Insurance Co.

11. The City has not changed the contention it made in the federal court proceedings. The City has continuously argued to the United States District Court that abstention was required because "proceedings were en train to accomplish those tasks" (direct appeal to the State of Nevada District Court) at the time the federal complaint was filed. See Petition for Rehearing filed in connection with the Petition for Writ of Certiorari in No. 90-1771, filed

November 1, 1991, at pages 19-20, reading:

> "The trial judge had general jurisdiction to determine whether he had subject matter jurisdiction, i.e. to determine whether the complaint stated a valid cause of action under the civil rights statute, 42 U.S.C. section 1983. Having been informed (1) that the City of Henderson had initiated quasi-judicial proceedings under City of Henderson ordinances which authorized the City Council to act in a quasi-judicial capacity to determine whether a business license had been wrongfully obtained through fraud, and (2) that the city ordinance and state statutes authorized a direct appeal from the City Council's determination to the District Court of Nevada, and (3) that proceed-

ings were en train to accomplish those tasks, the trial judge had exhausted his general jurisdiction, in that he was required to conclude:

> (1) that a valid civil rights lawsuit had not been pleaded; (2) that he had no jurisdiction to enjoin the City of Henderson from proceeding under valid ordinances and statutes; and (3) that, under Huffman v. Pursue, Ltd., supra, he must dismiss the civil rights lawsuit for lack of subject matter jurisdiction and failure to state a cause of action.

At the time federal plaintiffs filed their federal complaint, Nevada procedural law provided federal plaintiffs with an effective opportunity to raise all constitutional claims before the state reviewing courts. Federal plaintiffs' election not to appeal within the state system the state

administrative finding of fraud and license revocation order does not change the fact that a plaintiff "cannot escape Younger abstention by failure to assert its state remedies in a timely manner." Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987), footnote 16, at 16.

12. Henderson Municipal Code, H.M.C. Section 4.06.160 authorizes judicial review of "questions of law," which includes review of any constitutional questions raised by licensees in City Council license revocation hearings, and will be so interpreted by the Nevada Court, when and if it is allowed to be so construed by the State of Nevada Courts. Petitioner's claim is sufficient to compel abstention under Huffman v. Pursue, Ltd., 420 U.S. 592, 601 (1975). Compare the United States District Court's Decision at page 4, line 4, through page 6, line 5.

13. The federal trial Court's

Findings of Fact that:

> "As permitted by H.M.C. Section 4.04.150, the Court revoked plaintiffs' license for making a false or fraudulent statement in the application for a license."

(see Decision at page 8, lines 12-14) and its Conclusion of Law that:

> "It is evident that Plaintiffs attempted to avoid the City's zoning and licensing regulations through deception."

(see Decision at page 8, lines 15-16), conclusively establishes the validity of Petitioner's claim that Plaintiff has not and cannot provide the "heightened pleadings" which this Court's decision in Huffman v. Pursue, Ltd. requires. The United States District Court was therefore required to grant Petitioner's Motion to Dismiss on the authority of Huffman rather than proceeding to render a decision on the merits of federal

plaintiffs claim, reexamining de novo the "fraud" and "revocation" issues, and dismissing for the erroneous reasons given in its decision (which are chronicled in this Supplemental Brief).

The United States District Court's Finding of Fact that the plaintiffs obtained the license "through deception" demonstrates that the federal court has decided the very question of law that the Nevada District Court should have been allowed to make. By upholding and confirming the action taken by the Henderson City Council, the federal trial court improperly juxtaposed itself as an "appellate" court between the City Council and the Nevada District Court and the Nevada Supreme Court, contrary to federal law and in violation of the legislative provisions of the Nevada appellate procedure, pursuant to which the Nevada District Court has been designated as the Court

which had jurisdiction to hear direct appeals on federal constitutional questions raised at the City Council's License Revocation Hearing. This part of the United States District Court's Decision and Judgment of November 27, 1992 unequivocally demonstrates the merits of Petitioner's claims in this Supplemental Brief:

> (1) of an actual, not theoretical 11th Amendment violation of the United States Constitution occurred on November 27, 1992 at the time of entry of the United States District Court's Decision and Judgment;
>
> (2) that the United States District Court lacks "subject matter" jurisdiction, because the state court has jurisdiction of the subject matter on the important questions of law (including mixed questions of law and fact) re

license revocation by the City Council, based on licensees' fraud; and

(3) of an immediate right to relief under the All Writs Act as requested in the Petition in No. 92-643 and a right to attorneys fees under 42 U.S.C. Section 1988.

In sum, it is Petitioner's contention in this Supplemental Brief that Huffman v. Pursue, Ltd. is apposite; that the United States District is required to apply the "heightened pleading" rule judicially established by this Court in Huffman, and that said federal court has erroneously failed to do so; that a valid civil rights cause of action has not been stated under 42 U.S.C. Section 1983, and that this was apparent on Petitioner's Motion to Dismiss; that the United State District Court's ruling on the merits on the fraud issue and entry of a Final Judg-

ment as to that issue on November 27, 1992 constitutes a usurpation of the Nevada District Court's appellate jurisdiction and, as such, is a patent violation of the 11th Amendment and this Court's stated policy re "comity" between the states and federal judicial systems which has been fashioned to avoid 11th Amendment conflicts; that while the United States District Court was correct in finding no cognizable federal civil rights violation existed, the rationale followed in its Decision at page 8, lines 15-19 (see Appendix A), explaining its refusal to address plaintiffs' constitutional challenge as presented in the civil rights lawsuit, after it had reviewed the evidence, reading:

> "It is evident that plaintiffs attempted to avoid the City's zoning and licensing regulations through deception. Accordingly,

> plaintiffs cannot attack the revocation of their license, which was based upon the discovery of their deception, by challenging the constitutionality of the underlying law."

appears to be nothing more than an application of the "clean hands" equitable doctrine, and would be a proper ruling for the Nevada District Court for the Eighth District on appeal to that state court of the City Council's fraud finding, but an erroneous ruling for the United States District Court, District of Nevada, sitting as a trial court in the federal civil rights lawsuit below.

Petitioner respectfully contends that the United States District Court at paragraph 2, footnote 1, reading:

> "Equally distressing, however, is that the City's counsel failed to properly

identify the issue or to cite the readily available controlling law. At most, counsel made an unnecessarily circuitous argument that the fraudulent application precluded a federal challenge because 'none of [the] ordinances were given an opportunity to be construed by the City and state court judiciary.' This cursory argument is not only incorrect, but it ignores the opinions of the Supreme Court holding that plaintiffs cannot raise any constitutional challenge of a law that they have attempted to avoid by deception."
is not well taken in as much as Petitioner did not envision the United States District Court would position itself in the stead of the Nevada District Court, and claim the right of appellate jurisdiction over the record in the City Council Hearing and its Finding of Fraud.

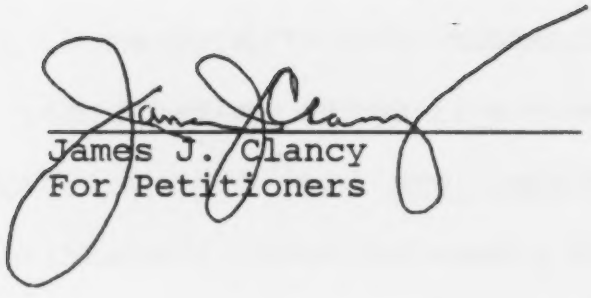
CONCLUSION

For all of the reasons stated in the Petitions for Writ of Certiorari in Case No. 90-1771, and Case No. 92-643, and the Supplemental Brief herein in Case No. 92-643, Petitioner is entitled to immediate relief either by the issuance of an extraordinary Writ of Mandate under the All Writs Act, vacating the Decision of the United State District Court entered on November 27, 1992, and mandating a dismissal of the federal civil rights action, or by this Court's grant of the Petition for Writ of Certiorari in Case No. 92-643 for resolution of Questions I and IV regarding the jurisdictional issue and the requirement for "heightened pleadings" where a right to relief under Huffman v. Pursue, Ltd. has been validly raised, and a resolution of the additional issue as to whether attorney fees should be granted to a prevailing defendant in a

United States District Court Civil Rights Action which has wrongfully been filed by a business corporation whose license had been validly revoked by the City of Henderson because of the fraud which was perpetrated by the corporation in its application for a business license.

Dated: December 2, 1992

Respectfully Submitted,



James J. Clancy
For Petitioners

APPENDIX A

DECISION AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF NEVADA, BY THE HONORABLE LLOYD D. GEORGE, ENTERED NOVEMBER 27, 1992 IN CV-S-90-264-LDG(LRL)

[Reference: Supplemental Brief at pages 1, 2, 3, 12, 13, 16, and 17.]

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al., Plaintiffs, v. CITY OF HENDERSON, et al., Defendants.	CV-S-90-264-LDG (LRL) DECISION [ENTERED NOV. 27, 1992 Clerk, U.S. Dist. of Nevada By _____Deputy]

The parties have submitted this matter for trial on the briefs. Plaintiffs seek a declaratory judgment that certain ordinances of the City of Henderson are unconstitutional and seek to enjoin enforcement of the ordinances.

Facts

On April 4, 1989, the City of Henderson enacted a new Zoning Code. Among its provisions, the Zoning Code limited the operation of adult businesses to a newly defined Commercial-Highway ("CH") zone. In implementing the Zoning Code, the City

roughly adapted its old zoning map but failed to create any CH zones. Further, the City failed to designate any CH zones until it adopted a new zoning map on December 4, 1989.

In the interim, plaintiffs applied for a business license to operate an adult business. In response to this application, plaintiffs were informed that an adult business could only be operated in a CH zone, that no CH zone existed, that they would have to obtain a zone change or variance, and that they would have to obtain a conditional use permit. Plaintiffs were also informed that, until they had met these conditions, their business license would not be authorized.

Plaintiffs' subsequently filed a new application for a license to operate a general business, omitting any reference to the adult nature of the business. The City approved this

second application in September. On February 1, 1990, plaintiffs opened an adult business. The City immediately commenced a revocation proceeding. In April, the City found that plaintiffs misrepresented the nature of their business on the application and revoked the license. Plaintiffs brought this action to stay the revocation, arguing that the various city ordinances are unconstitutional.

Lack of Jurisdiction

As an initial matter, the court notes that, contrary to the arguments of the City, the Younger abstention doctrine does not divest this court of jurisdiction. This doctrine "does not arise from lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced." Ohio

Civ. Rights Com'n v. Dayton Christian Schools, 477 U.S. 619, 626 (1986). The issue properly raised by Younger abstention is not whether this court lacks jurisdiction, but whether it should abstain from exercising its jurisdiction.

Abstention

This court is mindful of the principle that "abstention from the exercise of federal jurisdiction is the exception, not the rule." Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976). Federal courts are especially reluctant to abstain when First Amendment issues are involved. Baggett v. Bullitt, 377 U.S. 360, 379 (1964); Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 532 (9th Cir. 1984), rev'd on other grounds, 475 U.S. 14 (1986).

Previously, the City argued that

its action for declaratory judgment, brought in state court, compelled abstention. The City brought its state court suit four months after this court had entered a preliminary injunction in this federal action. "Younger abstention is required, however, only when state court proceedings are initiated 'before any proceedings of substance on the merits have taken place.' Hicks v. Miranda, [422 U.S. 332, 349 (1975)]. In other cases, federal courts must normally fulfill their duty to adjudicate federal questions properly brought before them." Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 238 (1984). This court affirms its prior ruling that the state court proceeding brought by the City did not compel abstention.

The City now argues that abstention is compelled by the City Council hearing and decision which

revoked plaintiffs' business license. This revocation proceeding, the City asserts, remains pending for Younger purposes. The City argues that "[s}tate proceedings...for which the state offers statutory appellate review through its courts or otherwise, are pending for Younger purposes from the time it is [sic] initiated, until it has [sic] completed the review process."

This court is not persuaded that the revocation proceedings remain pending for purposes of abstention. Not only must the state offer judicial review, but this review must permit review of the constitutional issues raised by the proceeding. The vital consideration guiding a determination of Younger abstention is comity: the federal government's proper respect for legitimate activities of state government. Huffman v. Pursue, Ltd.,

420 U.S. 592, 601 (1975).

Abstention accords the state judiciary the opportunity to oversee constitutional issues arising in litigation over which it has jurisdiction. Id., 420 U.S. at 609. Thus, "it is sufficient...that constitutional claims may be raised in state-court judicial review of the administrative proceeding." Ohio Civ. Rights Com'n v. Dayton Christian Schools, 477 U.S. 619, 629 (1986). Conversely, a proceeding which does not permit judicial review of constitutional claims is insufficient to compel abstention.

Although the City provides for judicial review of City Council determinations, this review is extremely limited. Pursuant to Henderson Municipal Code ("H.M.C.") Section 4.06.160, decisions of the City Council regarding business licenses may

be appealed to the state district court. This appeal is limited to a "judicial review of questions of law." This limited review is further narrowed to "the specific rulings on questions of law which the petition contends constitutes error." H.M.C. Section 4.06.160(a). Under this provision, petitioners can only appeal those questions of law for which the City Council has made a specific ruling. By not ruling on a constitutional issue, the City Council can preclude judicial review of that constitutional claim.

This is exemplified by the present case. Plaintiffs attempted to raise constitutional issues at the revocation hearing, although the City Council did not address any of these issues. At one point, Mayor Kesterson stated "I'm not trying the Constitution here and don't want to go into all that. We have a set case here that we are trying to

follow." Verbatim Transcript of License Revocation Hearing Held Before the City Council of Henderson ("V.T."), at 88 (April 10, 1990). Later, in apparent reference to the constitutional issues raised, Councilmember Williams remarked, "I really think that as far as we are concerned, some of [the] things that have been brought up are not in our prerogative to decide." V.T. at 244.

The City's order revoking plaintiffs' license reflects Mayor Kesterson's assertion that constitutional issues would not be decided. The specific rulings are expressly limited to believability of witnesses, the adult nature of the plaintiffs' business, and the finding that plaintiffs' misrepresented the nature of the business in obtaining a license. Since the City failed to make specific rulings on plaintiffs' constitutional questions, plaintiffs

are precluded from seeking judicial review of their constitutional claims. The lack of opportunity for plaintiffs' to pursue judicial review of constitutional claims indicates that the City Council hearing was not a pending state action for purposes of Younger abstention. Accordingly, because a state action was not pending when substantial proceedings occurred in this federal action, abstention is inappropriate.

Plaintiffs' Constitutional Challenge

Plaintiffs argue that the various provisions of the Henderson Municipal Code, as they existed when plaintiffs applied for a business license, were unconstitutional.[1] Without any support,

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[1] The Court is disturbed by the failure of both parties to cite any authority on the fundamental and critical issue of whether plaintiffs' (Footnote Continued)

plaintiffs contend that, since the regulatory scheme was invalid, the statements they made on their license application are immaterial. This court disagrees.

Until the City Council hearing, plaintiffs had not sought to challenge the constitutionality of the provisions of the Henderson Municipal Code.

(Footnote Continued)
fraudulent application precluded a constitutional challenge of the underlying law. Plaintiffs contend the fraudulent statements are immaterial, but fail to offer any argument, or law, distinguishing the contrary controlling law.

Equally distressing, however, is that the City's counsel failed to properly identify the issue or to cite the readily available controlling law. At most, counsel made an unnecessarily circuitous argument that the fraudulent application precluded a federal challenge because "none of [the] ordinances were given an opportunity to be construed by the City and state court judiciary." This cursory argument is not only incorrect, but it ignores the opinions of the Supreme Court holding that plaintiffs cannot raise any constitutional challenge of a law that they have attempted to avoid by deception.

Rather, they attempted to circumvent the City's Code by filing a second, misleading application. A plaintiff may challenge a regulatory scheme without first submitting to the unconstitutional law. Shuttlesworth v. Birmingham, 394 U.S. 147, 151 (1969); Fernandes v. Limmer, 663 F.2d 619, 625 (5th Cir. 1981). However, a plaintiff may not

> invoke the process of the court to obtain a ruling on an issue that he practiced deception to avoid. 'When one undertakes to . . . mislead [government officials] by false statements, he has no standing to assert that the operations of the Government in which the effort to . . . mislead is made are without constitutional sanction.'

Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1974), citing Kay v. United States, 303 U.S. 1, 6 (1938). In Dennis v. United States, 384 U.S. 855 (1966), the Court reiterated that a plaintiff who practices a course of fraud and falsehood in an attempt to circumvent a law, may not challenge the

constitutionality of the law when the deception is discovered. Whether a provision is constitutional or not is legally irrelevant to the validity of a finding that deception was used to avoid application of the law. Bryson v. United States, 396 U.S. 64, 68 (1969).

In the present case, plaintffs attempted to circumvent the City's Code by following a course of deception. Initially, plaintiffs applied for a business license for an adult business. The City then informed the plaintiffs of certain conditions that an adult business had to meet before a license would be authorized. In response to this information, plaintiffs did not seek judicial protection from the City's provisions. Nor did they attempt to meet the conditions for obtaining a license for an adult business. Nor did plaintiffs challenge

the law by opening and operating an adult business without obtaining any license.

Rather, plaintiffs inquired whether a business license would be approved for a general business. The City responded that such an application for a general business would be approved. Plaintiffs, fully aware that a license for a general business would be approved whereas an application for an adult business would be rejected, submitted a second application which specifically omitted any reference to an adult business. This second application was approved and, on February 1, 1990, plaintiffs opened an adult business. The City then revoked the plaintiffs' business license, finding that plaintiffs had misrepresented the nature of the business on the license application in order to obtain a license. As

permitted by H.M.C. section 4.04.150, the Council revoked plaintiffs' license for making a false or fraudulent statement in the application for a license.

It is evident that plaintiffs attempted to avoid the City's zoning and licensing regulations through deception. Accordingly, plaintiffs cannot attack the revocation of their license, which was based upon the discovery of their deception, by challenging the constitutionality of the underlying law.

This decision shall constitute the findings of fact and conclusions of law. Judgment will be entered accordingly.

DATED this 25th day of November, 1992.

LLOYD D. GEORGE
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

NEVADA ENTERTAINMENT INDUSTRIES, INC., et al., Plaintiffs, v. CITY OF HENDERSON, et al., Defendants.	CV-S-90-264-LDG (LRL) JUDGMENT [ENTERED NOV. 27, 1992 Clerk, U.S. Dist. of Nevada By _____Deputy]

Judgment is hereby entered in favor of Defendants City of Henderson and James Goff, Chief of Police of the City of Henderson, and against Plaintiffs Nevada Entertainment Industries, Inc., and Daniel Bishop. The preliminary injunction entered by this court on June 5, 1990, is lifted. Pursuant to 42 U.S.C. Section 1988, the court may, in its discretion, award attorney's fees to the prevailing party. It is the court's determination that, although Defendants prevailed, their defense does not warrant an award of attorney's fees. Pursuant to Local

Rule 205, Defendants shall file a bill of costs and disbursements with the clerk.

DATED this 25th day of November 1992.

LLOYD D. GEORGE
United States District Judge